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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

WILLIAM B. SAXBE, ATTORNEY GENERAL OF THE UNITED STATES, and NORMAN A. CARLSON, DIRECTOR, UNITED STATES BUREAU OF PRISONS, PETITIONERS

v.

THE WASHINGTON POST CO. and BEN H. BAGDIKIAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Attorney General of the United States and the Director of the United States Bureau of Prisons, petitions for a writ of certiorari before final judgment to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The district court's opinions of April 5, 1972 (App. A, *infra*, pp. 13-28) and December 19, 1972 (App. B, *infra*, pp. 29-36) are reported at 357 F. Supp. 770 and

779. The court appeals' order of September 6, 1972 (App. C, *infra*, pp. 37-39) is reported at 477 F.2d 1168.

JURISDICTION

The jurisdiction of this Court to review the instant case, which is pending in the United States Court of Appeals for the District of Columbia Circuit, is invoked under 28 U.S.C. 2101(e).

QUESTION PRESENTED

Whether the practice of the United States Bureau of Prisons of banning press representatives from conducting individual face-to-face interviews with particular federal inmates violates the First Amendment.

REGULATION INVOLVED

United States Bureau of Prisons Policy Statement No. 1220.1A (February 11, 1972) provides that:

> (6) Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.[1]

STATEMENT

This is a suit brought by a newspaper and one of its reporters to compel petitioners to permit respondents to conduct individual face-to-face interviews with particular inmates of federal prisons at Lewisburg, Penn-

[1] Policy Statement No. 1220.1A is reprinted in its entirety, App. D, *infra*, pp. 40-45.

sylvania, and Danbury, Connecticut,[1] and to require petitioners to issue regulations permitting inmates to grant such interviews to press representatives. Following a hearing, the district court invalidated, as violating the First Amendment, Bureau of Prisons Policy Statement No. 1220.1A (App. D, *infra*, pp. 40-45), which prohibits inmates from granting such interviews to press representatives. The court's order of April 5, 1972, directed the petitioners to issue, within 30 days, rules which "establish a general policy of the Federal Bureau of Prisons to permit, subject to reasonable restrictions as to time and place, confidential, uncensored press interviews with any inmates willing to be interviewed" (App. A, *infra*, pp. 27-28). Pending the issuance of such rules, the court ordered petitioners to consider, on an individual basis, requests by the press to interview inmates, and to grant such interviews "except where it can be established that serious administrative or disciplinary problems would be created by the interview sought" (App. A, *infra*, p. 28).

The district court and the court of appeals refused a stay pending appeal. On May 12, 1972, this Court granted a stay pending appeal (406 U.S. 912).[2]

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[1] The work stoppages at Lewisburg and Danbury in February 1972 which led to respondents' request for interviews with inmates at those institutions were the subject of full hearings conducted in March and May 1972 in litigation commenced by inmates of those institutions against federal officials. The decisions dismissing those actions are reported in *Meyers* v. *Alldredge*, 348 F. Supp. 807 (M.D. Pa.), and *Banks* v. *Norton*, 340 F. Supp. 917 (D. Conn.).

[2] In accordance with the provision of the district court's order requiring petitioners to consider requests for individual interviews while it is promulgating the new regulation, the Bureau of Prisons on May 8, 1972 authorized respondents to interview seven inmates at Lewisburg.

Pursuant to an expedited briefing schedule, the case was briefed, argued and submitted to the court of appeals on June 30, 1972. On September 6, 1972, the court of appeals issued an order remanding the case to the district court for reconsideration in light of *Branzburg v. Hayes*, 408 U.S. 665 (decided June 29, 1972), and to make specific findings on a number of issues, including the necessity of personal interviews and the legitimacy of the Bureau's "big wheel" policy rationale for the non-interview rule (App. C, *infra*, pp. 37-39).[1] After conducting an evidentiary hearing on November 21-22, 1972, the district court entered another decision adverse to petitioners on December 19, 1972 (App. B, *infra*, pp. 29-36).

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[1] The court of appeals directed that specific findings be made with respect to (App. C, *infra*, pp. 38-39):

> 1. The extent to which the accurate and effective reporting of news has a critical dependence upon the opportunity for private personal interviews.
> 2. The extent to which the so-called "big wheel" justification has any tangible footing in a significantly wide spectrum of experience in prison administration.
> 3. The factual foundations for any other asserted justifications for blanket prohibition of private personal interviews.
> 4. Whether there may be a valid basis for a ban, in the interest of avoiding impairment of good order, as to a particular prisoner or prisoners, even in the absence of a prior history of unruliness or disruptiveness.
> 5. Whether it is unfeasible to pursue a flexible approach to the allowance of private personal interviews, with appropriate scope for the judgment of the responsible prison officials and their consideration of administrative convenience or necessity.
> 6. Any other matters which, in the view of the District Court, by reference to *Branzburg* or otherwise, would further refine and illuminate the competing claims and assertions made by the parties so that ultimate resolution of the news access right under the First Amendment claimed in this instance may be as informed as possible.

In its supplemental decision, the district court reaffirmed the findings and conclusions in its first opinion,[5] made additional findings,[6] concluded that *Hrans-*

[5] In that opinion, the court had stated (App. A, *infra*, pp. 18-19):

> Several considerations have prompted the Bureau's decision which was reached only after serious deliberation and study:
>
> (1) Excessive press attention to a relatively few notorious prisoners has detracted measurably from their rehabilitative treatment and imposed administrative difficulties.
>
> (2) When press interviews are held they receive immediate wide attention throughout the prisons and the importance of the prisoner interviewed is exaggerated among other inmates. Thus prisoners receiving wide press attention may become "big wheels" and have their status within the prison community enhanced to a point that seriously interferes with effective discipline. *Neale* v. *Manson*, 326 F. Supp. 1375 (D. Conn. 1971).
>
> (3) A few prisoners may use the medium of the press to foster revolt within the walls. All news that goes out comes back in by newspaper, television and radio. Angry words, false accusations and protest geared to violence can light a fuse that erupts the pent-up emotions of inmates who may feel neglected and abused.
>
> These are all real considerations and while somewhat impressionistic, they are supported by experience and advanced in good faith.

[6] The district court found that the Bureau's "big wheel" policy justification for its interview ban does not "withstand analysis" because the term "big wheel" has no "precise meaning" and "[n]ot all prominent offenders or prison leaders fall in this category" (App. B, *infra*, p. 30). It also concluded that "accurate and effective reporting of news about prison conditions and events and prisoner grievances has a critical dependence upon the opportunity for face to face interviews with inmates" (App. E, *infra*, p. 57). The court also found that "the defendants have not imposed a news blackout on events and conditions at federal prisons, as the plaintiffs have alleged in their papers," and that "[t]he sources of information about federal prisons * * * which are available to the news media under Policy Statement 1220.1A enable newsmen to obtain some information about events and conditions at federal prisons" (App. E, *infra*, p. 51). The court adopted in its opinion, some of plaintiffs' proposed findings of fact and all of plaintiffs' proposed conclusions of law (App. B, *infra*, p. 36; App. E, *infra*, pp. 46-72).

burg was inapplicable, and again held that the Bureau's Policy Statement banning individual interviews violates the First Amendment.[7] While primarily resting its decision upon a putative First Amendment right of journalists to gather news, the court apparently refused to "differentiate between the rights of the press and the rights of prisoners committed to the custody of the Bureau" (App. A, *infra*, p. 18; App. B, *infra*, pp. 29, 35).[8] The district court directed that every request by a news representative for an individual interview with a federal inmate must be granted except "where it can be established as a matter of probability on the basis of actual experience that serious administrative or disciplinary problems are, in the judgment of the prison administrators directly concerned, likely to be directly and immediately caused by the interview because of either the demonstrated behavior of the inmate concerned or special conditions existing at the inmate's institution at the particular time the interview is requested" (App. B, *infra*, p. 35).

The parties thereafter filed supplemental briefs with the court of appeals,[9] which heard oral argument and took the case under submission on July 24, 1973. The case is still pending before that court.

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[7] The district court also stated (App. B, *infra*, pp. 34-35):

> The stay entered by the Supreme Court of the United States, 406 U.S. 912 (1972), has resulted in a continuing serious suppression of paramount constitutional rights which requires immediate attention.

[8] The quoted language appears in the court's first opinion, which the supplemental decision reaffirmed.

[9] The briefs were filed in February, March and April 1973.

REASONS FOR GRANTING THE WRIT

This case presents closely related issues to those involved in *Procunier* v. *Hillery*, No. 73-754, probable jurisdiction noted, January 7, 1974, and *Pell* v. *Procunier*, No. 73-918, probable jurisdiction noted, January 21, 1974. These cases all present the question whether the First Amendment gives the press the right to interview inmates in prisons and, if so, what restrictions the prison authorities may impose upon such interviews in order to preserve and maintain prison discipline and proper prison administration. Although the *Procunier* cases involve a state prohibition upon press interviews with prison inmates and the present case involves a similar federal restriction, the underlying First Amendment issues involved are essentially the same, and the decision in the *Procunier* cases could also well determine the validity of the federal prohibition involved in the present case.

As explained below, the record in the present case contains a detailed exposition of the reasons that have led federal officials to prohibit press interviews with prisoners as well as extensive testimony indicating the reasons why journalists consider it important to be able to conduct such interviews. We believe that it would greatly aid the Court in deciding the important issues which it has undertaken to review in *Procunier* if it also had before it at the same time the full record in the present case. Moreover, because of the close interrelationship between the two cases, we suggest that the Court should not decide the state cases without also having this important federal case before it.

For these reasons, we think it would be appropriate

in this case for the Court to grant certiorari before judgment in the court of appeals under this Court's Rule 20 and to decide at the same time the authority of both state and federal prison officials to prohibit journalists from interviewing prisoners. See *United States* v. *Thomas*, 361 U.S. 950; *Taylor* v. *McElroy*, 360 U.S. 709, 710; *Kinsella* v. *Krueger*, 350 U.S. 986, 351 U.S. 470, 473; *Bolling* v. *Sharpe*, 344 U.S. 873 (see discussion in *Brown* v. *Board of Education*, 344 U.S. 1, 3); *Porter* v. *Dicken*, 328 U.S. 252.

The *Procunier* cases presumably will be argued at this Term of Court. In order to avoid their being delayed until next Term, if the Court grants the present petition prior to the argument in those cases, the government will undertake to file its brief in sufficient time so that this case may be argued this Term together with *Procunier*.

1. In *Hillery* v. *Procunier*, 364 F. Supp. 196 (N.D. Calif.), a three-judge district court rejected the contention that journalists have a right under the First Amendment to interview state prisoners, except where a compelling state interest justifies curtailment of such right in individual situations. The court, however, invalidated the California Department of Corrections rule that "Press and other media interviews with specific individual inmates will not be permitted," on the ground that the First Amendment entitles inmates to conduct face-to-face interviews with the press and other media in the absence of proof that any particular interview would present a "clear and present danger" to prison security. Both the California Department of Corrections and the press representatives appealed

that decision, and as noted, this Court has noted probable jurisdiction of those appeals.

In this case, the district court held that press representatives have a First Amendment right to conduct individual face-to-face interviews with particular federal inmates, and that all such interviews must be permitted unless the Bureau of Prisons proves, in advance, by objective evidence, that serious harm will "directly and immediately" result from any particular interview (App. B, *infra*, p. 35). The district court also stated that it could not "differentiate between the rights of the press and the rights of prisoners committed to the custody of the Bureau" (App. A, *infra*, p. 18). While there may be significant distinctions between the federal correctional system and state correctional systems, this Court's decision in *Procunier* will undoubtedly have a substantial impact upon, and probably control, the result in this case.

2. Consideration of the present case together with *Procunier* will illuminate the issues there. The district court in that case recognized that officials of the United States Bureau of Prisons had made a "considerable study" of interview practices and had concluded that "the ban on interviews is necessary to maintain the discipline, custody and control of the prison[s]" (364 F. Supp. at 204).[10] The record in the present case is complete and includes extensive testimony explaining

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[10] While the court referred to the record in *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, 480 F.2d 1062 (C.A. 9), which sustained the Bureau's no-interview rule, at least as applied to maximum security facilities, the record in this case even more fully explains the basis of the Bureau's policy.

the reasons for the policy adopted by the Bureau, including its reliance upon the California Department of Corrections experience. The record in the present case also includes extensive testimony by journalists and others seeking to justify personal interviews, contains a survey of interview practices in a number of states and other countries, and contains evidence dealing with the distinctions between the state correctional systems and the federal correctional system."

The present case would thus provide the Court with a comprehensive view of, and a significant federal perspective on, the problems of prison administration and inmate and press needs which we believe would aid the Court in deciding the important First Amendment issues presented in *Procunier*.

3. The question whether journalists have a First Amendment right to interview prisoners in federal penal institutions is an important one which is currently the subject of substantial litigation, and which warrants review by this Court. In addition to the present case, the issue is pending before the Seventh Circuit in *Mitford* v. *Pickett*, No. 73-1958 (district court sustained the rule as applied to Marion Penitentiary, another maximum security institution, 363 F. Supp. 975); a federal district court in *Wicker* v. *Saxbe*, Civ. No. 112-72 (D.D.C.) (class action by journalists and federal inmates stayed pending outcome of *Washington Post*); the First Circuit in *McMillan* v. *Carlson*,

[1] Copies of the court of appeals appendix and supplemental appendix in the present case are being lodged with the Clerk of this Court.

No. 74-1024 (district court decision of December 31, 1973, held that author has First Amendment right to interview John Larry Ray, inmate at Marion Penitentiary); and a federal district court in *Globe Newspaper Co.* v. *Saxbe*, Civ. No. 73-3748G (D. Mass.) (suit by ~~author~~ press to interview inmate Clifford Irving at a federal prison). (Prelim. Inj. granted (Feb. 12, 1974))

In litigation which has been concluded, the Bureau's no-interview rule was sustained by the Ninth Circuit, at least as applied to McNeil Island Penitentiary, a maximum security institution, in *Seattle-Tacoma Newspaper Guild, Local #82* v. *Parker*, 480 F.2d 1062. In *Houston Chronicle Pub. Co.* v. *Kleindienst*, 364 F. Supp. 719 (S. D. Tex.), the district court held that the press has a First Amendment right to interview federal inmates at a County jail. See also *Smith* v. *Bounds*, Civil No. 2914, decided March 14, 1972 (E.D. N.C.), affirmed, C.A. 4, No. 73-1658, June 8, 1973 (sustaining State rule in inmate suit); *Seale* v. *Manson*, 326 F. Supp. 1375 (D. Conn.) (sustaining State rule on individual basis in inmate suit); and *Burnham* v. *Oswald*, 342 F. Supp. 880 (W.D. N.Y.) (invalidating State rule).

CONCLUSION

For the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be granted.

Robert H. Bork,
Solicitor General,

Irving Jaffe,
Acting Assistant Attorney General,

Leonard Schaitman,

Neil H. Koslow,
Attorneys.

February 1974.

APPENDIX A

The WASHINGTON POST CO. and Ben H. Bagdikian, Plaintiffs,

v.

Richard G. KLEINDIENST, Acting Attorney General of the United States and Norman A. Carlson, Director, United States Bureau of Prisons, Defendants.

Civ. A. No. 487-72.

United States District Court, District of Columbia. April 5, 1972.

Declaration and Order May 12, 1972.

MEMORANDUM OPINION

GESELL, District Judge.

This complaint seeks injunctive and declaratory relief. Plaintiffs, a newspaper and one of its experienced reporters, sought permission to interview certain prisoners at two federal penitentiaries: Lewisburg and Danbury. Defendant Carlson denied this request, relying on the Bureau of Prisons' Policy Statement of February 11, 1972, which flatly prohibits any interviews of prisoners subject to control of the Bureau, regardless of the reason for the request or the prisoner's status or offense.[1] Plaintiffs claim that this flat prohibition of the policy contravenes the First Amendment. They emphasize their desire to interview only prisoners willing to be interviewed and they recognize reasonable restraints as to time and place may be imposed so long as such interviews are not censored or overheard by prison

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[1] Policy Statement No. 1220.1A is appended. Paragraph 11.(B) states in part: "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. . . ."

officials. Restrictions upon interviews during periods of prison emergency are not questioned in this litigation.

Plaintiffs have a legitimate news interest. The Washington Post has run a comprehensive series on prison conditions, illustrated by articles attached to the complaint. The unsuccessful effort to interview which led to this litigation related to matter of obvious public interest. Recent work stoppages at Lewisburg and Danbury had apparently been satisfactorily resolved without bloodshed through negotiations between the Wardens and inmate representatives. Information subsequently came to the Washington Post that inmate ringleaders had been punished and that this was contrary to assurances given by prison authorities. The newspaper had reason to believe that some members of the inmate negotiating committees may have been placed in solitary, maced, deprived of necessary medical care and otherwise harshly treated. This information came from lawyers for inmates and their relatives, from prisoner letters and also from scattered congressional sources. The newspaper was interested not only in publicizing these apparently peaceful settlements which contrasted with several recent violent prison outbreaks but was prepared to expose any brutality or unwarranted retaliatory discipline if intimations received proved well founded.

Defendants contend that the press has no constitutional right of access to inmates for confidential interviews and urge that the same Bureau policy which permits contact between prisoners and the media both through uncensored mail and by casual conversations held in the course of prison tours[5] provides sufficient access and is not arbitrary.

The Court denied a temporary restraining order immediately after the complaint was filed. Thereafter a hearing was promptly held on the prayer for preliminary injunction. Testimony was taken from several penal experts[6] and the

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[5] This is the meaning and effect of the second half of paragraph 4.b.(6) of the Policy Statement.

[6] The following witnesses testified at the hearing: plaintiff Ingelhart; Benjamin Malcolm, Commissioner, New York City Department of Corrections; Leroy Anderson, Executive Assistant to the Director, District of Columbia

parties have filed detailed briefs. With consent of the parties the matter was submitted to the Court for final decision on the merits following the hearing.[3]

There are few decisions that have considered whether the First Amendment implicitly guarantees access to news sources under special conditions such as those here presented.[4] While the right to publish is firmly established, the Amendment's implications in terms of access are not resolved. There is, of course, an absolute right of privacy which the press cannot invade. An individual may refuse to be interviewed. Those who wish to consult or meet in private for the day-to-day conduct of public or business affairs may, in furtherance of their own common right to privacy, exclude the media. These commonly accepted situations are, however, obviously quite distinct from the special circumstances presented by this particular controversy. Here the Bureau has not denied the press access to its own personnel. Rather, it has imposed a bar on persons placed in its care by the courts who may wish to talk with the press and are willing to be interviewed.

There is no law that deprives prisoners of their right to speech by communicating with the press. Indeed, the courts have repeatedly been at pains to point out that the fact of conviction does not automatically deprive prisoners of rights guaranteed under the Constitution. "[A] prisoner does not shed his First Amendment rights at the prison portals." Brown v. Peyton, 437 F.2d 1228, 1230 (4th Cir. 1971). Indeed, "A prisoner retains all the rights of an

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Department of Corrections; Raymond K. Procunier, Director of Corrections of the State of California; Noah L. Alldredge, Warden, United States Penitentiary at Lewisburg, Pennsylvania; John J. Norton, Warden, Federal Correctional Institution at Danbury, Connecticut; and Norman A. Carlson, Director, Federal Bureau of Prisons.

[3] Because of the constitutional issues the proceedings were expedited. The complaint was filed March 10, 1972, the TRO was denied March 18, 1972, and the full hearing was held March 23.

[4] In addition to cases cited elsewhere in this opinion, see generally, Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958); Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

ordinary citizen except those expressly, or by necessary implication, taken from him by law." Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887, 65 S.Ct. 1568, 89 L.Ed. 2001 (1945). While "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . ," reasonable necessity, to be determined on a case-by-case basis, must dictate any official retraction of such rights. Price v. Johnston, 334 U.S. 266, 285-286, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). The courts have repeatedly preserved First Amendment rights of prisoners to the free exercise of religion, Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed. 2d 1030 (1964); Brown v. Peyton, *supra*; Barnett v. Rodgers, 133 U.S.App.D.C. 296, 410 F.2d 995 (1969); Long v. Parker, 390 F.2d 816 (3rd Cir. 1968); to receive mail, Palmigiano v. Travisono, 317 F.Supp. 776 (D.R.I. 1970); to receive newsletters, Fortune Society v. McGinnis, 319 F.Supp. 901 (S.D.N.Y. 1970); and, notably, to communicate with the press by uncensored mail concerning prison management, treatment of offenders, or personal grievances, Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).

The press can be superficial, overly persistent and sometimes lacking in objectivity, but nonetheless the need to grant substantial press access to prisoners is readily apparent. Prisons are public institutions. The conduct of these institutions is a matter of public concern. Whenever people are incarcerated, whether it be in a prison, an insane asylum, or an institution such as those for the senile and retarded, opportunity for human indignities and administrative insensitivity exists. Those thus deprived of freedom live out of the public's view. It is largely only through the media that a failure in a particular institution to adhere to minimum standards of human dignity can be exposed. Indeed, needed reforms in these areas have often been sparked by press attention. Conversely, secrecy is inconsistent with responsible official conduct of public institutions for it creates suspicion, rumor, indifference, if not distrust. Disinterest causes abuses to multiply. *See* Grosjean v. American Press Co., *supra*.

The Bureau is not wholly unconscious of these considerations. It recognizes that the public has a legitimate and hopefully continuing interest in its affairs. It has not sought completely to black out the press. Federal penal institutions are open to reasonable press inspection and confidential mail communication between prisoners and the press is permitted. There is no evidence that the Bureau is attempting to conceal. In spite of the serious overcrowding and lack of adequate funds for personnel and essential programs, it is attempting to set a high standard of inmate care.

In refusing to permit press interviews under any circumstances, the Bureau is prompted by considerations of administrative convenience and possible disciplinary or other difficulties which undue press attention to particular inmates may engender, affecting either the individual prisoner or his fellow inmates. The Washington Post insists that the in-depth individual inmate interviews are essential to adequate, fair reporting. It contends that the limited access afforded under the Bureau's policy is wholly inadequate. Communication by correspondence is said to be too impersonal and timeconsuming. In order to write reliable stories, it is suggested, there is a need to observe demeanor, to probe by questioning and to overcome the barrier of semi-illiteracy and suspicion that may inhibit inmates when they write. Prison tours and related conversations with individuals or groups are characterized as too hit-and-miss, too limited, too casual, too unproductive to enable a reporter to probe a given situation.

Since "[t]he right to speak and publish does not carry with it the unrestrained right to gather information," Zemel v. Rusk, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1964), the issue here tendered is, nonetheless, whether the interview restraint imposed by the Bureau's policy is unduly restrictive. A continuing flat prohibition against press interviews of any prisoner, at any time, under any circumstances, in any institution, is on its face arbitrary. The burden of justification rests upon the defendants. Cf., Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d

965 (1963); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). It is not a matter of the Court substituting its judgment for the Bureau's but rather whether, given the breadth of the prohibition, it appears after balancing the considerations pro and con that the justification offered is obviously deficient. In short, are the limitations placed on First Amendment freedoms no greater than is necessary to protect the governmental interests asserted?* As this inquiry is pursued there is no need to differentiate between the rights of the press and the rights of prisoners committed to the custody of the Bureau. News gathering and news dissemination cannot be disassociated under circumstances such as these where it is assumed there is a mutual desire to communicate and where, in the last analysis, the public right to be informed may well overshadow either of the other two considerations. DeJonge v. Oregon, *supra*, 299 U.S. at 364-365, 57 S.Ct. 255.

Accordingly, it becomes necessary to examine the Bureau's justification for its absolute interview prohibition with care. Several considerations have prompted the Bureau's decision which was reached only after serious deliberation and study:

(1) Excessive press attention to a relatively few notorious prisoners has detracted measurably from their rehabilitative treatment and imposed administrative difficulties.

(2) When press interviews are held they receive immediate wide attention throughout the prisons and the importance of the prisoner interviewed is exaggerated among other inmates. Thus prisoners receiving wide press attention may become "big wheels" and have their status within the prison community enhanced to a point that seriously interferes with effective discipline. Beale v. Manson, 326 F.Supp. 1375 (D.Conn. 1971).

(3) A few prisoners may use the medium of the press to

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* Sherbert v. Verner, *supra*; NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); DeJonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1936).

foster revolt within the walls. All news that goes out comes back in by newspaper, television and radio. Angry words, false accusations and protest geared to violence can light a fuse that erupts the pent-up emotions of inmates who may feel neglected and abused.

These are all real considerations and while somewhat impressionistic, they are supported by experience and advanced in good faith. The Court is satisfied, however, that the interview prohibition is too all-inclusive and that the factors mentioned do not justify a blanket denial of press access to all individual inmates willing to be interviewed. It is possible to prevent the difficulties and excesses feared by far less restrictive measures. Individual interviews may be refused where difficult administrative or disciplinary problems threaten and it goes too far to exclude all inmates from press access through individual interviews.

The National Council on Crime and Delinquency in its proposed model act to provide minimum standards for protection of rights of prisoners would permit press access to individual prisoners for interview. *Crime and Delinquency*, Vol. 18, January 1972, p. 13. See also, *An Introduction to Prison Reform Legislation Clearinghouse Review*, Vol. V, No. 11, March 1972, p. 667. Press interviews are freely permitted throughout the New York City correctional system, by the District of Columbia Department of Corrections, and by several states. (Exhibits 1-8, inclusive). Many tensions are thus relieved. California, for example, long had rules permitting interviews but terminated them after a recent outbreak at one prison attributed in part to many inflammatory interviews permitted a single prisoner. However, its knowledgeable, experienced Director, were it not for questionable legal advice, would still permit interviews in many sectors of his statewide correctional system.

Not only is there a difference in practice and viewpoint among correctional officials on the subject of press interviewing generally, but there is another overriding factor that calls into question the propriety of any blanket prohibition such as that presented in the Bureau's policy. The great bulk of federal prisoners, perhaps as many as ninety

percent, are incarcerated for non-violent crimes. Many of these men and women in federal institutions have completed high school or its equivalent. Many are articulate and thoughtful.

Yet even prisoners released into the community under various training, furlough and other policies placing the prisoner into unsupervised contact with nonprisoners, may still not be allowed to talk with the press. The policy applies not only to the six major penitentiaries but also to the entire far-flung complex of institutions, camps, community treatment centers, minimum security compounds, and schools and business establishments which employ offenders in various special programs.

Moreover, the Bureau is committed to many policies which are increasingly moving offenders out of traditional institutional confinements with a view to expanding community involvement in correctional programs to facilitate successful reintegration into society. *Biennial Reports, U.S. Board of Parole*, July 1968-June 1970, p. 14; and *Federal Bureau of Prisons*, 1970-71. It will further these objectives if the public is kept informed to the fullest extent possible and it will be only through increasing prisoner contact that the press can adequately report on activities and developments affecting those institutions. The contention that legal and practical considerations necessitate the total prohibition is not accepted.

To date, except in very special circumstances, the press generally has shown little interest in our prisons and the public has shown almost a callous disregard for the urgent needs of these imperfect institutions. The quality of a society may be measured by the manner in which it treats its criminal offenders. There is now, fortunately, a growing concern in this area expressed by the Executive, the Courts and the bar. Much wider press interest and more general public concern should be encouraged.'

' "[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945).

The Bureau's no-interview policy violates the First Amendment by unqualifiedly denying the press the right to interview inmates. The rules of the Bureau must be more precisely drawn to prohibit interviews only where it can be clearly established that serious administrative or disciplinary problems are being created.[8] There are obviously less drastic means for accommodating the Bureau's proper purpose and still accommodating the strictures of the First Amendment.[9] Any outright restraint upon the ability of the press to gather information places a heavy burden on those who seek to justify it and the burden in this instance has not been met. NAACP v. Button, *supra*; Shelton v. Tucker, *supra*. Distinctions can readily be drawn to differentiate types of institutions and prisoners in the same or different categories. The thrust of new press regulations should be to permit uncensored confidential interviews wherever possible and to withhold permission to interview on an individual basis only where demonstrable administrative or disciplinary considerations dominate. There is no necessity to treat all inmates alike and it will be appropriate to recognize a high degree of discretion in individual prison administrators. The Bureau will be well advised to seek the advice of experienced newsmen, to leave room for experimentation and to move toward more flexibility in its policies and procedures governing prisoner-press contacts. (See tr. p. 134).

Defendants are directed to issue in thirty days a modified rule governing interviews consistent with this opinion. In the interim, interview requests must be considered on an individual basis. Defendants will be enjoined from enforcing the blanket interview prohibition now contained in the Bureau's Policy Statement.

The complaint contains not only a broad attack on the Bureau's Policy Statement but a specific demand for im-

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[8] "The Court recognizes the proper reluctance of Courts to interfere with a prison's internal discipline and can accept without difficulty the rationale of such decisions as Burnham v. Oswald, 333 F.Supp. 1128 (W.D.N.Y. 1971), but it cannot agree with the broader view taken by the learned Judge in Smith v. Rounds, No. 2914 (E.D.N.C. March 14, 1972) for the reasons stated herein.

[9] See cases cited note 6 *supra*.

mediate access to interview prisoners at Lewisburg and Danbury. This special request requires brief comment. After the complaint was filed, the Wardens of both institutions offered Bagdikian the opportunity to interview selected prisoners in a group without supervision or censorship but under time restrictions and to visit solitary where ringleaders were allegedly being held. Full advantage was not taken of these proffers, perhaps for reasons of litigating strategy. Only one inmate correspondent has apparently indicated a desire to be interviewed. Some of the prisoners involved are reported to be testifying in other public proceedings. The mails remain open. Under these circumstances, the Court declines to order the defendants to allow the specific interviews desired. These particular interview denials are invalid. They should be reconsidered by the Bureau in the light of this Memorandum Opinion and post-hearing developments. The request for mandatory or other emergency relief is denied. Plaintiffs' motion to reopen the record is denied.

The foregoing shall constitute the Court's findings of fact and conclusions of law. The parties shall submit an appropriate order within five days.

APPENDIX

BUREAU OF PRISONS WASHINGTON, D. C. 20537

Policy Statement 1220.1A

SUBJECT: INMATE CORRESPONDENCE WITH REPRESENTATIVES OF THE PRESS AND NEWS MEDIA 2-11-72

1. PURPOSE. This Policy Statement establishes the policy of the Bureau of Prisons, with respect to contacts with the press. The purpose is to protect First Amendment rights of inmates, within the constraints of sound institutional management.

2. POLICY. Recognizing the right of inmates to have access to the news media, inmates may correspond freely with representatives of the press. Representatives of the press are encouraged to visit Bureau of Prisons institutions, to learn about and report on correctional facilities, activities, and programs.

3. DIRECTIVE AFFECTED. Policy Statement 1220.1 is superseded by this Policy Statement.

4. PROCEDURE.

   a. *Application*

   This Policy Statement applies to the news media, which is defined as the following:

   A newspaper entitled to second class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station.

   b. *Procedure*

   (1) An inmate may write to a representative, specified by name or title, of the news media. Correspondence to a newsman may be sent through the Prisoners Mail Box, which provides opportunity for unopened correspondence with officials such as

congressmen, judges, and other government officers. It shall be forwarded directly, promptly, sealed, and without inspection.

(2) A representative of the news media may initiate correspondence with a particular inmate. Incoming correspondence from the news media will be inspected solely for contraband, or for content which would incite conduct which is illegal. Rejected correspondence will be returned to the sender, with an explanation. Questions to the inmate may be presented through this correspondence, and the inmate may respond through the Prisoners Mail Box.

(3) The inmate shall not receive any compensation, nor anything of value, for material submitted through this means to the media.

(4) A transmittal slip, similar to the enclosed sample, will be attached to the outgoing PMB letter, and the mail will be sent each working day, in an institution envelope, and at government expense. Facilities with substantial numbers of psychiatric patients may also attach a statement, indicating that there are inmates in the facility who are psychotic, who have been found to be incompetent or of unsound mind, or who have other psychiatric problems.

(5) Representatives of the press are encouraged to visit Bureau institutions for the purpose of preparing reports about institutional facilities, programs and activities. Press representatives should make advance appointments for visits. During an institutional emergency, the Chief Executive Officer may suspend all such press visits. During the emergency, information concerning the situation will be provided regularly to the press.

(6) Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted

with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

(7) When media representatives visit institutions, photographs of programs and activities may be taken. Inmates have the right not to be photographed by the press. Visiting press representatives should be requested to obtain permission before photographing inmates and should be advised that full front view photos of inmates are not encouraged, but if taken, releases must be signed by the inmates.

(8) Press representatives may visit schools or business establishments which employ offenders in community programs, if the permission of the school or employer is obtained in advance. The rules outlined in paragraphs (6) and (7) above apply equally in the community situation.

(9) Announcements of unusual incidents shall be made to local news media as promptly as possible by the Chief Executive Officer or by a staff member designated by him. The institution will prepare a statement for release to the media, briefly stating the facts. The text of such messages shall be transmitted to the Bureau as part of the reports required on the incidents to which they relate. If it can reasonably be assumed that the wire services or the Washington press will make inquiry at the Central Office, the text should be communicated to the Central Office by telephone.

(10) Announcements related to Bureau policy, such as changes in institutional missions, type of inmate population, or physical facilities, as well as announcements of changes in executive personnel, will be made by the Central Office. Press inquiries on such subjects shall be referred to the Bureau Director.

(11) Information about an inmate that is a matter of public record will be provided by the Chief

Executive Officer or his representative to representatives of the news media upon request. Such information shall be limited to the inmate's name, age, offense for which convicted, court where sentenced, length of sentence, date of sentencing, date of arrival or transfer, general institutional assignment, parole eligibility date, and date of expiration of sentence. Other contents of inmate files are confidential. Requests for additional information about individual inmates shall be referred to the Central Office. The Chief Executive Officer of each institution, or his designated representative, shall be solely responsible for contacts with the press. Other staff members shall refer all press inquiries to the Chief Executive Officer.

(12) Representatives of the media are encouraged to notify the Chief Executive Officer before publication or dissemination of information in inmate correspondence, whenever statements naming individual inmates or staff members are made in that correspondence. In such instance, the institution will give all possible assistance in providing background and a specific report on the statement provided by the inmate.

c. *Exceptions*

Requests for exceptions to the above regulations may be made to the Director of the Bureau. Any disputes as to meaning or application of the regulations will be resolved by the Director.

(s) Norman A. Carlson
NORMAN A. CARLSON
Director, Bureau of Prisons

DECLARATION AND ORDER

The case having come on for trial on March 23, 1972, on plaintiffs' motion for preliminary relief, the parties at the

trial having consented to the submission of the entire case for final disposition on the merits, the Court having heard testimony and considered briefs, and the Court having issued a Memorandum Opinion containing findings of fact and conclusions of law on April 5, 1972, it is this 11th day of April, 1972, hereby

Declared:

1. That the first two sentences of paragraph 4(b)(6) of the Bureau of Prisons Policy Statement 1220.1A dated, February 11, 1972, prohibiting all interviews by members of the press with inmates in the custody of the Bureau, are in violation of the First Amendment to the Constitution of the United States.

2. That defendant's denials of permission to plaintiffs to interview identified inmates at the federal correctional institutions in Danbury, Connecticut, and Lewisburg, Pennsylvania, made in reliance on Policy Statement 1220.1A, were in violation of the First Amendment.

3. That under the First Amendment, subject to reasonable restrictions as to time and place, the press has a right of access to interview confidentially and without censorship any inmate of a federal correctional institution who consents to be interviewed, except where it is determined that serious administrative or disciplinary problems are likely to result from the particular interview sought; and it is hereby

Ordered:

1. That defendants and personnel of the Federal Bureau of Prisons subject to their direction and control, are hereby enjoined from enforcing the blanket prohibition of press interviews with inmates contained in the first two sentences of paragraph 4(b)(6) of the Bureau of Prison's Policy Statement 1220.1A, dated February 11, 1972.

2. That defendants shall issue not later than 30 days from the date of this Order new rules governing press interviews with inmates in the custody of the Federal Bureau of Prisons. Such rules shall satisfy the following conditions:

a. The rules shall establish a general policy of the Fed-

eral Bureau of Prisons to permit, subject to reasonable restrictions as to time and place, confidential, uncensored press interviews with any inmates willing to be interviewed.

b. If the rules authorize any exception to the general policy, the exception shall be precisely drawn to prohibit an interview only where it can be established as a matter of probability on the basis of actual experience that serious administrative or disciplinary problems are, in the judgment of the prison administrators directly concerned, likely to be created by the interview because of either the demonstrated behavior of the inmate concerned or special conditions existing at the inmate's institution at the particular time the interview is requested.

3. That between the date of this Order and the issuance of the new regulations, defendants shall consider on an individual basis requests by the press to interview inmates who may be willing to be interviewed, and if such inmates are willing to be interviewed defendants shall grant such interviews except where it can be established that serious administrative or disciplinary problems would be created by the interview sought.

APPENDIX B

The WASHINGTON POST CO., and Ben Bagdikian, Plaintiffs,

v.

Richard G. KLEINDIENST, and Norman A. Carlson, Defendants.

Civ. A. No. 467-72.

United States District Court,
District of Columbia.

Dec. 19, 1972.

SUPPLEMENTAL MEMORANDUM

GESELL, District Judge.

The additional evidentiary hearings ordered by the United States Court of Appeals for the District of Columbia Circuit, 477 F.2d 1168, have reinforced this Court's previously stated views as to both the facts and the law.

At the supplementary hearings, testimony was taken over a two-day period from Arthur L. Liman, General Counsel of the New York State Special Commission on Attica; Roy M. Fisher, Dean of the School of Journalism, University of Missouri; John O. Boone, Commissioner of the Massachusetts State Department of Corrections; Timothy Leland, Assistant Managing Editor of the *Boston Globe*; Noah L. Alldredge, Warden, U. S. Penitentiary, Terre Haute; Floyd L. Wainwright, Director, Florida Division of Corrections; Lou V. Brewer, Warden, Iowa State Penitentiary; and Norman A. Carlson, Director of the Federal Bureau of Prisons. Numerous exhibits were received. The parties submitted proposed findings of fact and briefs.

No further extended discussion is necessary. It is appropriate, however, to respond to the specific inquiries contained in the Order. The Court has determined on the

basis of detailed factual findings filed herewith that private personal interviews are essential to accurate and effective reporting. Ethical newspapers rarely publish articles based on unconfirmed letter communications. Reliability of such information must be determined by face-to-face confrontation. This is universally recognized by experienced journalists and demonstrated by the results of many confidential interviews conducted during the recent Attica investigation. Testimony of Lyman and Fisher and the Attica Report itself are particularly persuasive on this key issue. Kleindienst v. Mandel, 408 U.S. 753, 765, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), recognizes the intimate relationship between personal contact and the First Amendment's guarantees.

The "big wheel" justification did not withstand analysis. While the term is found in Soale v. Manson, 326 F.Supp. 1375 (D.Conn.1971), it has no precise meaning. Apparently it refers to prisoners whose militancy, tendency to act out and negative influence within a prison community make it likely that sustained press interviews and attention involving them may spark disruptive conduct by inmates within the walls. Not all prominent offenders or prison leaders fall in this category. The very few who do are usually, if not always, identifiable in advance. Interviews with such prisoners can be requested specially. The "big wheel" justification cannot, however, be used to stifle expression by any leader in the prison community who may differ with the warden and certainly it goes too far afield to blanket all federal prisoners under this rhetoric for the obvious purpose of stultifying dissent.

The further justification offered that all prisoners must be treated the same because if interviews are permitted in some instances and restricted in others, prison authorities will encounter administrative difficulties, provides no justification for the challenged regulation. This natural desire of federal prison authorities to avoid inconvenience cannot be interposed to defeat insistent demands of the First Amendment. There are, to be sure, situations where press access to individual prisoners should on occasions be denied either because of conditions prevailing at the moment

in a particular institution or for other reasons. Some prominent prisoners who exhibit no tendency to unruliness or disruption, for example, may attract such excessive press attention to the point that this interferes with the ability of the institution to adjust the prisoner to appropriate routine. Others may, after interviews, become identifiable as sources of disruption and some measure of control becomes appropriate.

The evidence strongly shows, however, the inappropriateness of a total interview ban and the necessity and feasibility of pursuing a more flexible approach based on individualized judgments in particular cases. Many city and state penal institutions, apparently the majority, permit interviews. There is nothing significant that distinguishes the bulk of federal prisoners from state prisoners except possibly the need to assure that the federal system as an acknowledged pace setter gives the fullest and most explicit formal recognition to constitutional rights of prisoners.

The Bureau of Prisons misconceives its obligation as a public institution. It has no absolute right to exclude the press. On the contrary, it has an obligation to lay open its activities to searching public scrutiny except to the extent that it can affirmatively establish a compelling necessity to limit press access. There is an important and continuing discourse about our prisons, and the "right to receive information" necessary to convey developments to the public is within the scope of protections afforded by the First Amendment. Kleindienst v. Mandel, *supra*, 408 U.S. at 764-765, 92 S.Ct. 2576.

The Court of Appeals has solicited an expression from this Court as to any other consideration that may have a bearing on the issues. Accepting this invitation, it should be apparent that at no time in recent memory has there been such general public concern with prisons and prison conditions. There is much to suggest that prison facilities are often inadequate, funds are lacking or misspent, prisoners with some frequency are abused or mistreated, escapes are frequent, guards are too permissive or sadistic, discipline is lacking, and riots and strikes are everyday occurrences.

Society is searching for an understanding of why these institutions appear so often to breed crime and lack satisfactory vocational and effective rehabilitative programs. In several states whole prison systems or major units have been found so lacking that they have been declared offensive under the Eighth Amendment. Trial judges are frustrated, for the intendment of the law is lost in a maze of bureaucratic inadequacies that frustrate effective sentencing. Many prison officials share these concerns. In short, this is a time of questioning and reappraisal when the expense, the futility and the inadequacies of present procedures for incarceration have again come into sharp focus.

No one can responsibly contend that prisoners do not have a point of view and experience that should in some degree affect the resolution of many problems highlighted by the current debate. Certainly no one can successfully contend that in these circumstances the press does not have a vital role to play.

The rule adopted by the Bureau of Prisons is a rule of comfortable convenience and not of compelling necessity. It simply serves to prevent too sharp an inquiry into official conduct. Prisons are not walled off sanctuaries like the Pentagon Map Room or the Justices' conference table at the Supreme Court. Prisons are villages in themselves. Families, lawyers, congressmen, clergymen and friends visit in public interview space provided. Newspapers, magazines, radio and television programs pour in incessantly throughout the day. Within the prison walls there is illness, drug distribution, prostitution and many other matters of everyday occurrence on the outside. Crimes are committed and punishments imposed during incarceration. Inmates are of varying ages, political persuasions and background. Some prisoners come and go on furlough or compassionate leave. Mail is substantially uncensored. Local communities are urged to participate in the affairs of these institutions by rendering neighborly family counselling and support. Indeed, half-way houses, vocational and educational programs, and other community ventures include prisoners serving time. The press has an obvious role to report the

successes and failures of these prison communities and there is no apparent reason why this should differ substantially from the role it normally plays on the outside. The need for public understanding and legislative support of penal institutions is obvious. This will not be forthcoming without knowledge based on informed discussions. The official pronouncements of the keepers need to be tested against the realities of incarceration. It is wholly inconsistent with an open democratic society to allow the state to seal off from press scrutiny thousands of men and women who have been charged with or found to have committed criminal offenses. Certainly the courts that commit these offenders have a responsibility under the Constitution to preserve those rights and freedoms which violation of the criminal laws has never been held to remove.

Nothing in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), suggests a conclusion different from that reached by the Court on the issues here presented. The Court there emphasized that news gathering qualifies under the First Amendment and newsmen must be afforded some protection for seeking out the news lest freedom of the press be eviscerated. *Id.* at 681, 707, 92 S.Ct. 2646. The Court recognized that right of access can only be infringed where the Government demonstrates a "compelling" or "paramount" need. And as Justice Powell, whose vote was necessary to obtain the majority, stressed in his concurring opinion, a balance must be attempted between constitutional and societal interests on a case-by-case basis. *Id.* at 709, 710, 92 S.Ct. 2646. Here newsmen merely seek the same rights to interview at prisons which are afforded relatives, clergymen, congressmen, friends and attorneys, as traditionally available to the public. This is not a case involving any invasion of privacy, interference with national security nor conduct that might in some fashion contravene court processes or other constitutional needs. It is not a mere "reasonable time, place and manner" regulation. The sources of news are solely in the prisons. No alternative satisfactory sources are available and the press claims its proper right of access. While this access may be limited in

individual circumstances, the Government has totally failed to demonstrate any "compelling" or "paramount" need. The absolute ban cannot withstand attack.

Other recent decisions are to the same effect. In Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), the Court struck down a city ordinance which permitted peaceful labor picketing but prohibited other peaceful picketing. In holding this ordinance offensive under the First Amendment, the Court noted that "predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications." *Id.* at 100-101, 92 S.Ct. at 2293. This is particularly pertinent, as the decision suggests, in view of the classification here that singles out newsmen to prevent them from exercising interview rights freely given others who present no lesser threat. Similarly, in Women Strike for Peace v. Morton, D.C. Cir., 472 F.2d 1273 (1972), the United States Court of Appeals for the District of Columbia Circuit gave further emphasis to the well-established proposition that any regulations affecting First Amendment conduct must be "precisely worded and specifically directed toward identifiable abuses." *Id.*, Wright, J., conc., at 1285.

In this Court's prior opinion numerous other decisions were cited which are all to the same effect. Each regulation challenged under the First Amendment must be viewed in the light of its own special circumstances and there is no automatic litmus test which can be applied in determining the scope and effect of the Amendment. Where broad, all-inclusive restrictions are placed in effect, it is particularly important for the state to justify the restrictions with solid fact, not surmise. In this instance the Bureau of Prisons has totally failed to meet this burden and the regulation must be condemned. The Bureau's regulation represents a continuing denial of First Amendment rights.

The stay entered by the Supreme Court of the United States, 406 U.S. 912, 92 S.Ct. 1761, 32 L.Ed.2d 112 (1972), has resulted in a continuing serious suppression of para-

mount constitutional rights which requires immediate attention. A free press cannot be fostered in an atmosphere that delays publication on matters of current public concern. The Courts have a responsibility to lift pre-publication restraints, not to encourage them, and must adjust their deliberative process accordingly.

Because the first two sentences of paragraph 4(b)(6) of the Bureau of Prisons Policy Statement 1220.1A dated February 11, 1972, prohibiting all interviews by members of the press with inmates in the custody of the Bureau, are in violation of the First Amendment to the Constitution of the United States, and because defendants' denials of permission to plaintiffs to interview identified inmates at the federal correctional institutions in Danbury, Connecticut, and Lewisburg, Pennsylvania, made in reliance on Policy Statement 1220.1A, were in violation of the First Amendment, a new regulation is clearly necessary.

Under the First Amendment, subject only to reasonable restrictions as to time and place, the press has a right of access to interview confidentially and without censorship any inmate of a federal correctional institution who consents to be interviewed, except where it is determined that serious administrative or disciplinary problems are likely to be directly and immediately caused by the particular interview sought. If such rules authorize any exception to the general policy, the exception must be precisely drawn to prohibit an interview only where it can be established as a matter of probability on the basis of actual experience that serious administrative or disciplinary problems are, in the judgment of the prison administrators directly concerned, likely to be directly and immediately caused by the interview because of either the demonstrated behavior of the inmate concerned or special conditions existing at the inmate's institution at the particular time the interview is requested.

In addition to findings of fact and conclusions of law contained in the Court's two Memoranda, the Court makes the following findings of fact by reference to proposed findings filed by the parties:

The Court adopts each of plaintiffs' proposed findings, except Nos. 29 through 46, and No. 51;

The Court adopts each of plaintiffs' proposed conclusions of law.

Defendants' proposed findings of fact and conclusions of law are rejected.

APPENDIX C

The WASHINGTON POST COMPANY et al.

v.

Richard G. KLEINDIENST, Acting Attorney General of the United States, et al., Appellants.

No. 72-1362.

United States Court of Appeals,
District of Columbia Circuit.
Argued June 30, 1972.

Decided Sept. 6, 1972.

ORDER

PER CURIAM.

This case came on for hearing on an appeal from a ruling by the District Court, reflected in a memorandum opinion dated April 9, 1972, 357 F.Supp. 770, that the policy of the Federal Bureau of Prisons in denying all requests by the press to interview designated prisoners violated the First Amendment. The Court directed the Bureau to modify its rules within 30 days to permit such interviews under terms and conditions appropriately reflective of administrative and disciplinary considerations. That decision is presently subject to a stay by the Supreme Court, issued May 13, 1972, pending appeal in this court.

At the oral argument, the Government pressed upon us a supervening decision by the Supreme Court in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626, decided June 29, 1972, as representing a significant limitation by the Supreme Court of the reach of the First Amendment in relation both to the precise issue immediately involved in the three cases then decided, and to the general area of press guarantees. *Branzburg*, unlike the case before us, compelled revelation by reporters to grand juries of infor-

mation gathered by them, but the First Amendment claim rested heavily upon the assertion that access to information would be restricted if such compulsion was exerted. One of the cases heard by the Supreme Court with *Branzburg* and reversed by it, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), was cited by the District Court as relevant to the scope of press access.

Since the case before us deals with the scope of First Amendment rights to access, *Branzburg* supplies a new element to be considered in the decisional process which was not in existence at the time the record was made and the conflicting claims resolved in the District Court. It seems obvious that considerations of sound judicial administration suggest that any record for future appellate consideration be made in awareness of it, if that is feasible under the circumstances, as it is here.

Accordingly, we have concluded, while retaining jurisdiction of this appeal, to remand the record for such further consideration as the District Court may wish to give the case in the light of *Branzburg* and, in any event, for specific findings (which may follow upon further evidentiary proceedings) with respect to the following:

1. The extent to which the accurate and effective reporting of news has a critical dependence upon the opportunity for private personal interviews.

2. The extent to which the so-called "big wheel" justification has any tangible footing in a significantly wide spectrum of experience in prison administration.

3. The factual foundations for any other asserted justifications for blanket prohibition of private personal interviews.

4. Whether there may be a valid basis for a ban, in the interest of avoiding impairment of good order, as to a particular prisoner or prisoners, even in the absence of a prior history of unruliness or disruptiveness.

5. Whether it is untenable to pursue a flexible approach to the allowance of private personal interviews, with

appropriate scope for the judgment of the responsible prison officials and their consideration of administrative convenience or necessity.

6. Any other matters which, in the view of the District Court, by reference to *Branzburg* or otherwise, would further refine and illuminate the competing claims and assertions made by the parties so that ultimate resolution of the news access right under the First Amendment claimed in this instance may be as informed as possible. By reason of the foregoing, it is hereby

Ordered that the record in this case is remanded to the District Court for the purposes hereinabove stated and, upon the conclusion of proceedings held hereunder, shall as supplemented be returned to this court for further consideration of the pending appeal.

APPENDIX D

BUREAU OF PRISONS

WASHINGTON, D. C. 20007

Policy Statement

SUBJECT: INMATE CORRESPONDENCE WITH REPRESENTATIVES OF THE PRESS AND NEWS MEDIA

2-11-72

1. PURPOSE. This Policy Statement establishes the policy of the Bureau of Prisons, with respect to contacts with the press. The purpose is to protect First Amendment rights of inmates, within the constraints of sound institutional management.

2. POLICY. Recognizing the right of inmates to have access to the news media, inmates may correspond freely with representatives of the press. Representatives of the press are encouraged to visit Bureau of Prisons institutions, to learn about and report on correctional facilities, activities, and programs.

3. DIRECTIVE AFFECTED. Policy Statement 1220.1 is superseded by this Policy Statement.

4. PROCEDURE.

   a. *Application*

   This Policy Statement applies to the news media, which is defined as the following:

   A newspaper entitled to second class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station.

b. *Procedure*

(1) An inmate may write to a representative, specified by name or title, of the news media. Correspondence to a newsman may be sent through the Prisoners Mail Box, which provides opportunity for unopened correspondence with officials such as congressmen, judges, and other government officers. It shall be forwarded directly, promptly, sealed, and without inspection.

(2) A representative of the news media may initiate correspondence with a particular inmate. Incoming correspondence from the news media will be inspected solely for contraband, or for content which would incite conduct which is illegal. Rejected correspondence will be returned to the sender, with an explanation. Questions to the inmate may be presented through this correspondence, and the inmate may respond through the Prisoners Mail Box.

(3) The inmate shall not receive any compensation, nor anything of value, for material submitted through this means to the media.

(4) A transmittal slip, similar to the enclosed sample, will be attached to the outgoing PMB letter, and the mail will be sent each working day, in an institution envelope, and at government expense. Facilities with substantial numbers of psychiatric patients may also attach a statement, indicating that there are inmates in the facility who are psychotic, who have been found to be incompetent or of unsound mind, or who have other psychiatric problems.

(5) Representatives of the press are encouraged to visit Bureau institutions for the purpose

of preparing reports about institutional facilities, programs and activities. Press representatives should make advance appointments for visits. During an institutional emergency, the Chief Executive Officer may suspend all such press visits. During the emergency, information concerning the situation will be provided regularly to the press.

(6) Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

(7) When media representatives visit institutions, photographs of programs and activities may be taken. Inmates have the right not to be photographed by the press. Visiting press representatives should be requested to obtain permission before photographing inmates and should be advised that full front view photos of inmates are not encouraged, but if taken, releases must be signed by the inmates.

(8) Press representatives may visit schools or business establishments which employ offenders in community programs, if the permission of the school or employer is obtained in advance. The rules outlined in paragraphs (6) and (7) above apply equally in the community situation.

(9) Announcements of unusual incidents shall be made to local news media as promptly as possible by the Chief Executive Officer or by a staff member designated by him. The institution will prepare a statement for release

to the media, briefly stating the facts. The text of such messages shall be transmitted to the Bureau as part of the reports required on the incidents to which they relate. If it can reasonably be assumed that the wire services or the Washington press will make inquiry at the Central Office, the text should be communicated to the Central Office by telephone.

(10) Announcements related to Bureau policy, such as changes in institutional missions, type of inmate population, or physical facilities, as well as announcements of changes in executive personnel, will be made by the Central Office. Press inquiries on such subjects shall be referred to the Bureau Director.

(11) Information about an inmate that is a matter of public record will be provided by the Chief Executive Officer or his representative to representatives of the news media upon request. Such information shall be limited to the inmate's name, age, offense for which convicted, court where sentenced, length of sentence, date of sentencing, date of arrival or transfer, general institutional assignment, parole eligibility date, and date of expiration of sentence. Other contents of inmate files are confidential. Requests for additional information about individual inmates shall be referred to the Central Office. The Chief Executive Officer of each institution, or his designated representative, shall be solely responsible for contacts with the press. Other staff members shall refer all press inquiries to the Chief Executive Officer.

(12) Representatives of the media are encouraged to notify the Chief Executive Officer before publication or dissemination of information

in inmate correspondence, whenever statements naming individual inmates or staff members are made in that correspondence. In such instance, the institution will give all possible assistance in providing background and a specific report on the statement provided by the inmate.

e. *Exceptions*

Requests for exceptions to the above regulations may be made to the Director of the Bureau. Any disputes as to meaning or application of the regulations will be resolved by the Director.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director, Bureau of Prisons

Attachment 1

(Sample Transmittal Slip)

UNITED STATES PENITENTIARY

Leavenworth, Kansas

Date

The attached letter was placed in our Prisoners Mail Box for forwarding to you. The letter has been neither opened nor inspected. If the writer raises a problem over which this institution or the Bureau of Prisons has jurisdiction, you may wish to write to me or to the Director, Bureau of Prisons, Department of Justice, Washington, D.C. 20537.

You may write back to the inmate, and ask him questions. Your letter will be inspected for contraband, and for any content which would incite illegal conduct.

The Bureau of Prisons encourages the press to visit institutions, and learn about correctional programs and activities. If you wish to do this, please contact me.

Inmates may not receive compensation for material submitted to the media. If the person writing you names another inmate or a staff member in his correspondence, we request that you advise us of that fact before its publication. We will provide background information and specific comments whenever possible.

If the writer encloses for forwarding correspondence addressed to another addressee, please return the enclosure to me, or to the Director.

Warden

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Washington Post Co., et al., Plaintiffs vs. Richard Kleindienst, et al., Defendants.	Civil Action No. 407-72

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, after full hearing, makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. The Parties and Nature of the Action

1. This is an action for declaratory and injunctive relief raising important questions concerning the rights of newsmen under the First Amendment to have access to federal prison facilities to conduct private, individual interviews with inmates confined to those facilities. The Court has jurisdiction of this action under 28 U.S.C. 1331, 1361, 2201 and 2202.

2. Plaintiff Washington Post Company is a Delaware corporation doing business in Washington, D.C. It publishes *The Washington Post*, a newspaper with a daily circulation in excess of 500,000 in the Washington metropolitan area and throughout the United States.

3. Plaintiff Ben H. Bagdikian was, at the time this action was filed, a reporter and an Assistant Managing Editor of *The Washington Post*. He has had extensive experience in reporting on prisons and has published in *The Washing-*

ton Post a comprehensive series of articles on prisons in the United States. Tr. I, pp. 7-10 (Bagdikian testimony).[1]

4. Defendant Richard G. Kleindienst is the Attorney General of the United States and, as such, has responsibility for and control over the policies and practices of the United States Department of Justice and its component divisions and bureaus, including the Bureau of Prisons.

5. Defendant Norman A. Carlson is Director of the Federal Bureau of Prisons and, as such, has direct responsibility for and control over the policies and practices of the Federal Bureau of Prisons.

6. The events leading to this litigation began with work stoppages that occurred at the federal prison facilities at Lewisburg, Pennsylvania, and Danbury, Connecticut toward the middle of February, 1972. Plaintiff Bagdikian learned of the work stoppages from various sources and subsequently received reports that inmates who had served on negotiating committees during the work stoppages had been the object of reprisals. Tr. I, pp. 11-12, 20, 57 (Bagdikian testimony).

7. Satisfied that the work stoppages and their aftermath constituted newsworthy events, Tr. I, p. 20 (Bagdikian testimony), Mr. Bagdikian called the Federal Bureau of Prisons on March 1, 1972 and asked permission to visit both Lewisburg and Danbury to interview members of the inmate negotiating committees and other inmates who had written to him with complaints. An official of the Bureau of Prisons informed Mr. Bagdikian that existing regulations did not permit such interviews. Tr. I, pp. 12-13 (Bagdikian testimony).

8. On March 2, 1972, Mr. Bagdikian repeated his request of March 1 in a letter written to defendant Carlson. Com-

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[1] Citations contained herein will be designated as follows: "Tr. I" refers to the Transcript of the hearing conducted on March 22, 1972; "Tr. II" refers to the Transcript of the hearing conducted on November 21 and 22, 1972; "PX" refers to exhibits offered by the plaintiffs at the two hearings; "DX" refers to exhibits offered by the defendants at the two hearings. In addition, the Official Report of the New York State Special Commission on Attica, which is Plaintiffs' Exhibit No. 9, will be referred to throughout as "Attica Report."

plaint Exh. C. By a letter also dated March 2, 1972, Mr. Carlson formally denied Mr. Bagdikian's request because "the Bureau of Prisons' policy does not permit press interviews with inmates." Complaint, Exh. D. On the basis of those denials, the plaintiffs initiated this action.

9. The current policy of the Federal Bureau of Prisons with respect to interviews and other communications between members of the news media and inmates is contained in Bureau of Prisons Policy Statement 1220.1A, dated February 11, 1972, and entitled "Inmate Correspondence with Representatives of the Press and News Media." Complaint, Exh. D.

10. The term "interview," as used in the Policy Statement, refers to a face-to-face oral communication that is planned in advance, involves a previously designated inmate, and lasts a sufficient time to permit an in-depth discussion.

11. Policy Statement 1220.1A prohibits all interviews between newsmen and inmates in all circumstances, regardless of the characteristics and record of the inmate sought to be interviewed, the willingness of the inmate to be interviewed, the institution in which he is held, conditions prevailing at that institution, the newsman's reason for seeking an interview, and any other factors. The prohibition of interviews is total, Policy Statement, ¶4(b)(6), and extends to "schools or business establishments which employ inmates in community programs." *Id.*, ¶4(b)(8). Thus even prisoners released into the community under various training, furlough and other programs involving unsupervised contact with non-prisoners may not be interviewed by the news media. The no-interview policy applies uniformly to the six major federal penitentiaries and the entire far-flung complex of institutions, camps, community treatment centers, minimum security compounds, and schools and business establishments which employ offenders in various special programs.

12. Policy Statement 1220.1A permits a newsman to hold

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[1] Hereinafter referred to as "Policy Statement 1220.1A."

a "conversation . . . with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities." ¶4(b)(6).

a. The distinction between an "interview" and a "conversation" is not explained in Policy Statement 1220.1A.

b. Director Carlson characterized a conversation as "something spontaneous" and lasting "five to ten minutes." Tr. I, p. 189 (Carlson testimony). Although there was some variation in how the term "conversation" was understood by the two federal wardens who testified, their interpretations were substantially similar to that of Mr. Carlson. See Tr. I, pp. 140-141, 164-165 (Alldredge testimony); *id.*, at 175-77 (Norton testimony).

c. In general, conversations, within the meaning of Policy Statement 1220.1A, occur when a newsman is taking a guided tour of an institution and stops to ask an inmate about the food, or the training programs, or some similar matter. *Id.*

d. The term "institutional facilities, programs and activities" in ¶4(b)(6) refers to ongoing programs for the inmate population. It does not include inmate strikes and similar disturbances of normal prison routine. Tr. I, pp. 19-20 (Bagdikian testimony); *but cf. id.* at 154, 166 (Alldredge testimony).

13. Policy Statement 1220.1A apparently permits a newsman to interview a randomly selected group of inmates at a federal correctional facility. Tr. I, p. 217 (Carlson testimony).

a. Policy Statement 1220.1A does not in terms or by implication authorize such group interviews.

b. Plaintiff Bagdikian was permitted to conduct an interview with a randomly selected group of inmates at Lewisburg Penitentiary. Tr. I, pp. 15-17 (Bagdikian testimony). He was offered the same opportunity at Danbury Correctional Facility. Tr. I, p. 18 (Bagdikian testimony).

c. Warden Alldredge could not remember that any group interviews with the press had previously occurred. Tr. I, p. 163 (Alldredge testimony).

14. Policy Statement 1220.1A permits inmates to send

to newsmen letters which are not opened by prison officials ¶4(b)(1).

15. Policy Statement 1220.1A permits newsmen to write to inmates letters which are inspected by prison officials for contraband and read for content which would incite unlawful conduct. ¶4(b)(2).

16. Policy Statement 1220.1A encourages newsmen to visit federal correctional institutions for the purpose of preparing reports about institutional facilities, programs and activities. ¶4(b)(5). Newsmen may also visit schools or business establishments which employ offenders in community programs, if the permission of the school or the employer is obtained in advance. ¶4(b)(8).

17. Policy Statement 1220.1A permits media representatives to take photographs of programs and activities at federal correctional institutions. If inmates are to be photographed, their permission must be obtained. ¶4(b)(7).

18. The plaintiffs contend that the total prohibition of interviews with inmates contained in Policy Statement 1220.1A contravenes their First Amendment right to gather information about events of public concern and the First Amendment rights of the public to be fully informed about the conduct of institutions supported with public money. Because the no-interview policy touches upon First Amendment rights, plaintiffs further contend that any governmental interests reflected in that policy must be protected by means less restrictive than the present flat prohibition of all interviews.

19. The defendants have argued that no First Amendment rights have been infringed because Policy Statement 1220.1A provides adequate means by which the news media and the public can inform themselves about conditions in federal prisons. In the alternative, the defendants contend that any restriction of First Amendment rights caused by the no-interview policy is justified by considerations of prison security, discipline and administrative convenience.

II. *The Need for Private, Confidential Interviews*

20. The Court finds that the news media and newsmen

have a legitimate interest in informing themselves and keeping the public informed about conditions in the institutions and facilities operated by the Federal Bureau of Prisons. Tr. I, p. 199 (Carlson testimony). Those institutions are generally closed to members of the public, although some persons—such as families and friends of inmates, clergymen, attorneys and Congressmen—are permitted to visit them on a regular basis. Nevertheless, despite the limited access to those institutions, they remain public institutions and their operations are a matter of public concern. Tr. II, p. 127 (Leland testimony); PX 14, p. 21 (Abel deposition); PX 63, p. 24 (Machacek deposition). The fact that federal prison facilities are not generally open to all members of the public only underscores the importance of the role that the news media can play in providing information about the conduct of those institutions. PX 65, pp. 57-60 (Mattick deposition).

21. The Court finds further that the plaintiffs had a legitimate news interest in seeking to develop additional information about the events that occurred at the federal prisons at Lewisburg and Danbury during and following the work stoppages at those two institutions. Specifically, the plaintiffs wished to examine how the work stoppages were resolved without bloodshed, the role played by inmate negotiating committees elected by the inmates in reaching a peaceful settlement of the disputes, and whether the inmate leaders had been punished despite promises of no reprisals. Tr. I, pp. 20, 57 (Bagdikian testimony).

22. The Court finds that the defendants have not imposed a news blackout on events and conditions at federal prisons, as the plaintiffs have alleged in their papers. See, *e.g.*, Complaint, ¶11. The sources of information about federal prisons, which are recited in paragraphs 12-17, *supra*, and which are available to the news media under Policy Statement 1220.1A enable newsmen to obtain some information about events and conditions at federal prisons.

23. The Court also finds, however, that the flat prohibition in Policy Statement 1220.1A of private, individual interviews between newsmen and inmates willing to be

interviewed prevents the news media from developing accurate and effective accounts of conditions and events in federal prisons or grievances of inmates confined to those prisons. Tr. 11, pp. 14-44 (Fisher testimony); *id.*, at 122-23 (Leland testimony); PX 14, pp. 15-18 (Abel deposition); PX 65, pp. 18-21 (Machacek deposition).

24. The Court heard uncontradicted testimony from experienced newsmen and journalism educators that the sources of information available under Policy Statement 1220.1A—either separately or in combination—are inadequate to permit the news media to develop accurate and in-depth knowledge of prison conditions or events or prisoner grievances, as the plaintiffs attempted to do in this case.[9]

a. The essential defect in limiting contact between newsmen and particular inmates with grievances or complaints to an exchange of correspondence, as the Policy Statement does, is that the newsman has no opportunity to confront those inmates and evaluate the credibility of the information they wish to convey. Tr. 11, p. 43 (Fisher testimony); *id.* at 131 (Leland testimony); PX 14, pp. 25, 32 (Abel deposition). The need for face-to-face confrontation can be of particular importance in the prison context because the inmate who complains by letter may be unknown to the news media and there would be no independent basis for evaluating his credibility and reliability. Tr. 11, p. 131 (Leland testimony).

b. Newsman-inmate communication by correspondence has other serious defects. It can cause delays in developing current information about events or prison conditions. Tr. 1, p. 22 (Hagdikian testimony); PX 65, p. 21 (Machacek deposition). Moreover, an exchange of correspondence does not permit a newsman to pursue a line of questioning in

[9] Except for plaintiff Hagdikian, the newsmen and educators who testified had not had extensive experience in covering or reporting on prison conditions. But there is no basis for assuming that the news-gathering techniques or needs of newsmen covering prisons will differ significantly from those of newsmen in other assignments. PX 14, pp. 16-17 (Abel deposition); PX 65, pp. 20-21 (Machacek deposition).

depth or to ask follow-up questions on the basis of a particular response. Tr. 11, p. 43 (Fisher testimony); *id.* at 180 (Leland testimony); PX 68, pp. 21-22; see Tr. 11, p. 14 (Liman testimony). There is also a well-founded suspicion on the part of newsmen that many inmates are not sufficiently literate to communicate effectively by means of the written word. Tr. 11, p. 180 (Leland testimony); PX 14, pp. 17-18 (Abel deposition). To the extent that newsmen cannot obtain the views of inmates who are not fully literate, an important source of information is likely to be lost. PX 65, p. 61 (Mattick deposition). The loss would not be mitigated by the opportunity for some inmates to write letters on behalf of others. *Id.*[1]

e. The opportunity offered newsmen to tour federal prisons and to engage in casual conversations with inmates encountered during the tour is not an adequate substitute for private, individual, in-depth interviews. Those conversations are limited in terms of their duration, Tr. 1, p. 141 (Alldredge testimony); *id.* at 175 (Norton testimony); *id.* at 189-190 (Carlson testimony), and content, Tr. 1, p. 47 (Bagdikian testimony); *but cf. id.* at 154, 166 (Alldredge testimony); newsmen cannot identify in their stories the inmates with whom they had conversations, Policy Statement, ¶4(b)(6); Tr. 1, p. 24 (Bagdikian testimony); and the conversations may be overheard by prison officials, Tr. 1, pp. 53, 54-55 (Bagdikian testimony); *but cf. id.* at 154 (Alldredge testimony). In addition, because the newsman cannot designate in advance the inmates with whom he will converse, the opportunity for casual conversations gives him no access to inmates who are known to have particularized complaints or other particularized information. Tr. 11, p. 187 (Leland testimony); PX 68, p. 82 (Machacek deposition).

d. The willingness of federal prison officials to provide the news media with information about events and condi-

[1] The Court also heard testimony that, because mail coming into a federal prison from a newsman is read for illegal content, inmates are likely to be reluctant to be wholly candid in their written exchanges with newsmen for fear of reprisals from prison officials. Tr. 1, pp. 16-17, 22-23 (Bagdikian testimony).

tions at those institutions is no substitute for private, individual interviews with inmates. Particularly when a newsman is seeking information relating to inmate complaints about the actions of prison officials or employees, newsmen who testified stated that their experiences make them skeptical that those officials or employees will provide them with objective and balanced information. Tr. II, p. 44 (Fisher testimony); *id.* at 128-129 (Leland testimony); PX 14, pp. 18-19, 30-31 (Abel deposition). That this skepticism is warranted is shown, for example, by the fact that public officials deliberately gave false information to the news media concerning how the hostages died during the Attica prison revolt in September 1971. PX 14, pp. 30-31 (Abel deposition); PX 63, pp. 5-14, 22-23 (Machacek deposition); PX 9, pp. 455-62 (Attica Report).

e. Plaintiff Bagdikian was given an opportunity at the federal prisons at Lewisburg and Danbury to interview several inmates selected at random from the prison population in a group and out of the hearing of prison officials or employees. Tr. I, pp. 15-18 (Bagdikian testimony). The group interview conducted by Mr. Bagdikian at Lewisburg proved "very unproductive," Tr. I, p. 50 (Bagdikian testimony), because the particular inmates he traveled to Lewisburg to interview were not part of the group and because the inmates who participated admitted they could not speak with candor out of fear that what they said would be reported to prison officials by other inmates and result in reprisals. Tr. I, pp. 17-18 (Bagdikian testimony). The evidence before the Court also shows that group interviews in the prison context are unsatisfactory because, when interviewed in groups, inmates tend to make speeches for the benefit of other inmates rather than relate facts. Indeed, the New York State Special Commission on Attica found that inmates interviewed in a group were far more critical of prison authorities than when they were interviewed in private. Tr. II, pp. 10-11 (Lilman testimony).

25. Based on the evidence recited in paragraph 24, *supra*, the Court finds that the sources of information available to the news media under the Policy Statement are inade-

quate for the development of accurate and effective news accounts of prison conditions and events and prisoner grievances.

26. The Court heard considerable, uncontradicted testimony from experienced newsmen, journalism educators and others concerning the importance of face-to-face private interviews as a news-gathering technique. That evidence showed the following:

a. The opportunity for face-to-face interviews with news sources is critical when the credibility and reliability of the source is unknown to the newsman. Tr. II, p. 32 (Fisher testimony); *id.* at 115-17 (Leland testimony).

b. A private interview with an inmate having a particularized grievance permits the newsman to "study the demeanor of the man, pursue questions at once, watch reactions, [and] confront him with things that seem to be internally inconsistent." Tr. I, p. 23 (Bagdikian testimony). None of those opportunities exists as a practical matter in the alternative sources of information available to newsmen under the current Policy Statement. *See* ¶24, *supra*.

c. In the prison context, newsmen need to interview, for purposes of corroboration, not only inmates known to have particularized grievances but also other inmates likely to have knowledge concerning the grievances. P'X 63, p. 21 (Machacek deposition).

d. The opportunity for a face-to-face interview is as important to a newsman gathering news as it is to an attorney developing his case, Tr. II, p. 14 (Lipman testimony), or a police detective investigating a crime. Tr. II, p. 130 (Leland testimony).

e. Face-to-face interviews with news sources play such a fundamental role in the news-gathering process that the development of interviewing techniques is a central feature of the curricula of the nation's most prestigious journalism schools. Tr. II, pp. 30-32 (Fisher testimony); P'X 14, pp. 8-10 (Abel deposition).

f. The Court was cited a number of examples in which face-to-face interviews played the critical role in newsmen's decisions to pursue a news story or not to publish the story.

Tr. II, pp. 33-35 (Fisher testimony); *id.* at 116-20 (Leland testimony); PX 14, pp. 11-13 (Abel deposition); PX 63, 15-18 (Machacek deposition).

g. In one instance cited to the Court, the *Boston Globe's* coverage of a jail disturbance was based solely on the statements of jail officials and attorneys for the inmates because its newsmen were not allowed to interview the inmates. The result was "rather grim black headlines" about mistreatment of inmates that the editor who supervised the story did not believe constituted responsible journalism. Tr. II, pp. 120-22, 139 (Leland testimony). But the newspaper had no choice but to report the story on the basis of the inadequate information available to it. *Id.* at p. 122.

h. The plaintiffs placed in evidence a study published by *Journalism Quarterly* which analyzed the reasons for inaccuracies in news stories. PX 10. A major conclusion of that study is that "lack of contact between the newsman and a news source increases the chance that serious subjective errors will be perceived as occurring or will occur." *Id.* at 756.

i. The report of the New York State Special Commission on Attica, PX 9, was based principally on some 3,000 interviews, 1,000 of them with inmates at that penal institution. Tr. II, p. 7 (Lilman testimony). It was the most comprehensive program of face-to-face interviews ever undertaken by persons other than prison authorities at a prison. *Id.* The General Counsel to the Commission recited to the Court an extensive catalog of significant information obtained through interviews with inmates that could not have been obtained in any other manner. *Id.* at 11-14. The Commission's experience was that confidential interviews with individual inmates were indispensable for the gathering of reliable information about conditions in prison, prisoner grievances and events in which inmates participate.

j. A sociologist with extensive experience in prison administration testified that he could obtain an understanding of a penal institution only if he had the opportunity to conduct face-to-face interviews with inmates and prison officials. PX 65, p. 48 (Mattick deposition).

27. Based on the evidence recited in paragraph 26, *supra*, the court finds that the accurate and effective reporting of news about prison conditions and events and prisoner grievances has a critical dependence upon the opportunity for face-to-face interviews with inmates.

28. The Court further finds that interviews with inmates, to be effective and productive, must occur in privacy, with only the newsman and inmate present. The presence of prison officials or prison employees can have an inhibiting effect on the interview process because "a prison official has total control over the life of a prisoner and [the prisoner] knows it." Tr. I, p. 24 (Bagdikian testimony). Even the presence of other inmates is likely to prevent a candid exchange with the newsman because the inmate being interviewed must be concerned with how the other inmates will react to the information he conveys. Tr. I, pp. 17-18 (Bagdikian testimony); Tr. II, pp. 10-11 (Lilman testimony).

III. *The Asserted Big Wheel Justification for Prohibiting Interviews*

A. *Definitions*

29. To clarify the issues raised by the asserted big wheel justification for prohibiting interviews between inmates and members of the press, the Court adopts the following definitions:

a. As used in these findings, the term "inmate leader" refers to an inmate at a correctional facility who commands a following among other inmates. Tr. II, p. 15 (Lilman testimony).

b. As used in these findings, the term "big wheel" refers to an inmate leader who is perceived by prison administrators to be negative, hostile and anti-social. Tr. I, p. 205 (Carlson testimony).

c. As used in these findings, the term "trouble maker" refers to an inmate who violates prison rules or engages in other unlawful conduct while in prison.

30. Under these definitions, every big wheel is an inmate leader, for big wheels are a category of inmate leaders;

but not every inmate leader is a big wheel. Big wheels are those inmate leaders whom prison administrators perceive as negative, hostile and anti-social; inmate leaders whom prison administrators perceive in other ways are not big wheels. It follows from these definitions that every finding that applies without qualification to inmate leaders applies also to big wheels.

81. Under these definitions, big wheels are not defined to be trouble makers. Whether inmates whom prison administrators perceive as negative, hostile and anti-social are in fact trouble makers is a question not of definition, but of empirical fact for determination on the evidence.

H. *The Emergence of Inmate Leaders (Including Big Wheels)*

82. The Court finds that leaders (including big wheels) emerge in inmate society in much the same way they do in other social groups. Inmates become leaders within an inmate population through force of personality and by virtue of their native talents—*e.g.*, articulateness and social skills generally, intellectual and athletic abilities, imagination. If an inmate lacks these qualities, he will not become an inmate leader; and interviews with the press cannot confer them. Many inmate leaders other than big wheels achieve leadership status by obtaining significant jobs within a prison. P'X 66, pp. 13, 22 (Mattick deposition); Tr. 11, p. 16 (Litman testimony); Tr. 11, p. 92 (Boone testimony); P'X 61, pp. 10-11, 39-41, 43 (discussion of "right guys" in *Theoretical Studies in Social Organization of the Prison*).

83. The Court further finds that several factors suggested as having some relation to the emergence of big wheels or other inmate leaders have in fact no such relation.

a. The fact that an inmate is well-known to the general public outside prison does not tend to make him a leader or big wheel within prison. P'X 66, p. 14 (Mattick deposition); Tr. 11, p. 180 (Alldredge testimony). The evidence shows without contradiction that some well known inmates have been inmate leaders. *See* Tr. 1, pp. 115, 117-18 (George

Jackson); Tr. 11, pp. 196-97 (Dr. Carl Coppolino). It also shows that other well-known inmates have not been inmate leaders. See sub-paragraphs (i) to (v) in support of this finding. The obvious conclusion is that whether or not a well-known inmate becomes a leader depends on other factors, principally those mentioned in paragraph 32.

(i) Nathan Leopold was very well-known to the general public while an inmate at Stateville Penitentiary at Joliet, Illinois, but was not an inmate leader or big wheel. P'X 65, pp. 18-19 (Mattick deposition).

(ii) Richard Speck is an inmate well-known to the general public, but is not an inmate leader or big wheel. *Id.* p. 14.

(iii) Sirhan Sirhan is an inmate well-known to the general public, but is not an inmate leader or big wheel. *Id.*

(iv) Al Capone was an inmate well-known to the general public, but did not have significant power or influence over other inmates while in prison. *Id.*

(v) Albert DeSalvo (the Boston Strangler) is an inmate well-known to the general public, but is not an inmate leader or big wheel. Tr. 11, p. 110-A (Boone testimony).

b. The fact that an inmate is *not* well-known to the general public outside prison does not prevent him from becoming a leader or big wheel within prison. For example, none of the inmates who exercised leadership positions during the nonviolent inmate strike at Lewisburg Penitentiary was known to the general public before or after the strike. Tr. 11, p. 184 (Alldredge testimony).

c. The fact that an inmate engages in militant or violent rhetoric (whether in discussions with other inmates or with newsmen) cannot alone make him an inmate leader or big wheel. P'X 65, pp. 23-24 (Mattick deposition); P'X 9, pp. 181-82 (Attica Report).

34. The Court heard testimony concerning the effects of press interviews from correctional officials in the federal prison system, and prison systems of New York City, the District of Columbia, Cook County, Illinois, and the states of Illinois, Massachusetts, Iowa, Florida, and California. Of all the witnesses who testified from these jurisdictions, only one testified on the basis of actual experience with

press interviews that they have led to the emergence of a big wheel. Tr. 1, pp. 115, 117-18 (Procunier testimony). None of the three federal correctional officials who testified in this case discussed a single instance where in their personal experience or to their personal knowledge press interviews had led to the emergence or enhancement of a big wheel. None cited a single federal prisoner who there was reason to believe would become a big wheel or a trouble maker or a more troublesome inmate in any way if interviewed by the press. Although witnesses from Illinois, Iowa and Florida testified that press interviews may occasion a major disturbance, none discussed a single instance where the leadership position of an actual or potential big wheel was materially or lastingly affected by press interviews. Witnesses from New York City, the District of Columbia, Massachusetts and Cook County testified that press interviews produced no serious problems from a correctional point of view.

55. Accordingly, on the basis of the evidence recited in paragraph 54, *supra*, the Court finds that interviews between a member of the press and an inmate, even an assertive, politically militant inmate, cannot make the inmate an inmate leader or big wheel when he otherwise would not be one. P-X 66, pp. 25-26 (Mattick deposition). Moreover, the Court finds that interviews between a member of the press and an inmate who already is a big wheel are not likely to enhance the status of the inmate significantly or for an extended period of time. Tr. 1, p. 74 (Malcolm testimony); Tr. 11, pp. 92-94 (Boone testimony). Thus, in sum, the Court finds that interviews between a member of the press and an inmate are not likely to have any significant or enduring effect on the relationship between that inmate and other inmates.

56. The Court further finds that just as interviews between members of the press and inmates are not likely to have significant or enduring effects on the leadership status of particular inmates vis-a-vis other inmates, such interviews if conducted during normal times (when there is no emergency or other crisis at the prison) are not likely to

have significant or enduring effects on the prevailing power relationship between inmate leaders on the one hand and the prison administration on the other. P'X 65, p. 22 (Mattick deposition).

37. Nor, the Court finds, are such interviews likely to have any influence on which inmates will assume leadership during a future disturbance or other future crisis at the prison. The men who assume leadership positions among the inmates during periods of crisis are men who already have leadership positions in inmate social groups or who have talents or personal qualities of the sort described in paragraph 32 which particularly fit them for leadership in such a situation. P'X 9, pp. 197-98 (Attica Report); Tr. 11, p. 110-A (Boone testimony).

C. Assessment of Inmate Leaders and Big Wheels in Light of Correctional Policies

38. The Court finds that not all inmate leaders are big wheels, and that, indeed, the vast majority of relationships between prison administrators and inmate leaders, though not warm and friendly, are moderate, functional and cooperative. P'X 65, p. 16 (Mattick deposition). Prison is not a place where every man's hand is raised against every other man every minute of the day. *Id.*, p. 17.

39. The Court finds that most inmate leaders are not oriented toward revolt, but on the contrary find it in their interest to aid in securing the custodial objectives of the prison staff, and in particular in maintaining good order in the prison. P'X 61, pp. 33, 45-46 (*Theoretical Studies in Social Organization of the Prison*).

40. On the basis of the evidence before it, the Court finds that big wheels do not provoke or otherwise cause large-scale prison violence or other major disturbances. P'X 9, pp. 104-13 (Attica Report); P'X 65, Exh. 1 (*The Prosaic Sources of Prison Violence*); Tr. 11, p. 96 (Boone testimony).

41. On the basis of the evidence before it, the Court finds that big wheels are not principally responsible for the introduction of militancy into inmate populations. In view of the fact that inmates are continuously entering

prisons from society at large and that even while in prison they have extensive exposure to events in the outside world, see, e.g., Tr. I, pp. 177-78 (Norton testimony); P'X 65, pp. 39-40 (Mattick deposition), it appears to the Court that big wheels play at most a marginal role in stimulating inmate militancy.

42. The Court finds that whereas inmate militancy can cause problems for prison administrators, such as an increase in tensions, or in nonviolent agitation for change, inmate militancy also can positively advance universal correctional goals. Militancy can lead inmates to examine realistically and critically their condition in prison and in life generally, and can contribute to giving them a stronger self-concept, a sense of dignity, and the desire and ability to make realistic decisions about their own lives. To the extent that big wheels contribute to inmate militancy, they may be advancing rather than hindering correctional goals. P'X 65, pp. 27-29 (Mattick deposition).

D. *Evaluation of Asserted Big Wheel Justification for Prohibiting Interviews*

43. Based on the evidence before it, the Court finds that the asserted big wheel justification for prohibiting all press interviews with all inmates under the jurisdiction of the Federal Bureau of Prisons has no tangible footing in a significantly wide spectrum of experience in prison administration.

IV. *Other Asserted Justifications*

A. *Prison Disturbances*

44. The Court heard considerable testimony from both a sociologist specializing in prison social structure and prison officials concerning the effect press interviews would have on prison tensions and disorders. That evidence tended to show the following:

a. Inmates and staff establish very complex and intricate kinds of mutually dependent social relations. Disorders develop when this internal social structure is disturbed

PX 65, pp. 81-83 (Mattick deposition); PX 65, Exhibit 1, (article, *The Prosaic Sources of Prison Violence*, attached to Mattick deposition).

b. Press interviews are not likely to have any effect on the internal social structure within prisons. PX 65, pp. 81-83, 45. (Mattick Deposition)

c. Press interviews with inmates have created no prison disturbances in New York City, Washington, D.C. or Massachusetts, although a substantial number have been held in these jurisdictions. Tr. I, p. 72 (Malcolm testimony); Tr. I, p. 98 (Anderson testimony); Tr. II, p. 83 (Boone testimony).

d. In some instances press interviews with inmates have helped to relieve tensions. Tr. I, p. 73 (Malcolm testimony); Tr. II, p. 83 (Boone testimony).

45. The Court heard other witnesses testify that there was a connection between press reports and prison disorders. Their testimony tended to establish the following:

a. The U.S. Penitentiary at Terre Haute and the Florida State Prison had disturbances both before and after the granting of interviews which resulted in press reports. Tr. II, p. 167 (Alldredge testimony); Tr. II, p. 214 (Wainwright testimony). A warden from Iowa testified that tensions increased as a result of press interviews, but did not indicate that there were any disturbances. Tr. II, p. 235 (Brewer testimony).

b. No causal connection has been shown between interviews and subsequent disturbances. Warden Alldredge, Commissioner Wainwright, and Warden Brewer all testified that in their opinion, tensions increased as a result of press reports. Tr. II, p. 165 (Alldredge testimony); Tr. II, p. 207 (Wainwright testimony); Tr. II, p. 235 (Brewer testimony). However, they offered no concrete evidence to support their views. Therefore, in the absence of contrary evidence the Court must assume that these tensions developed in the manner described in paragraph 44 *supra*.

c. Inmates quickly learn of all activities and events within an institution. Tr. I, p. 157 (Alldredge testimony). Therefore, it is unreasonable to assume that disturbances result

from press reports concerning affairs about which inmates already have prior knowledge.

d. Alldredge, Wainwright, Brewer and Bensinger all stressed a connection between published reports and inmate disturbances, not a causal relationship between interviews and disturbances. Tr. II, p. 165 (Alldredge testimony); Tr. II, p. 207 (Wainwright testimony); Tr. II, p. 235 (Brewer testimony); PX 64, p. 35 (Bensinger deposition). Therefore, presumably the same effect would occur if press reports were based on information received by correspondence rather than by press interviews.

e. The press reports concerning the U.S. Penitentiary at Terre Haute which allegedly led to inmate disturbances were based on interviews by a congressional aide, not by a member of the press. The Court cannot assume, in the absence of evidence, that the same consequences would follow from interviews between inmates and members of the press. Moreover, the policy permitting interviews by congressional aides is not a discretionary policy, and thus there is no opportunity to prohibit such interviews when disciplinary problems or disturbances are likely to result. Tr. II, p. 146, 158, 162 (Alldredge testimony).

f. The press reports in Florida and Iowa were based on interviews which the wardens would not have granted, had they not been overruled by superiors, because they believed that disturbances were likely to result in those instances. Tr. II, pp. 197-98 (Wainwright testimony); Tr. II, pp. 231-32 (Brewer testimony).

g. The interviews which allegedly created disturbances at the U.S. Penitentiary at Terre Haute and the Florida State Prison were interviews in institutions which normally did not permit press interviews. Tr. II, p. 195 (Wainwright testimony); Tr. II, pp. 159-60 (Alldredge testimony). Therefore, the Court cannot determine from these experiences the probable consequences of a policy which generally permitted press interviews.

46. Based on the evidence recited in paragraphs 44 and 45, *supra*, the Court finds that interviews between inmates and the press are not likely to be a significant factor in the

development of disturbances in federal penal institutions. To the extent that press interviews increase the level of discussion and tension within an institution, they are no different from numerous other events, both within and without the institution, that have a similar impact. PX 65, pp. 38-40 (Mattick deposition); Tr. I, p. 177 (Norton testimony).

B. *Other Security Problems*

47. The Court finds that press interviews with inmates are not likely to create any additional prison security problems. Tr. II, p. 88 (Boone testimony); PX 64, pp. 47-49 (Bensinger deposition).

a. Security procedures used by prison administrators to prevent the introduction of contraband by friends, relatives, attorneys, and other visitors to prisoners are readily applicable to newsmen entering prisons to interview inmates, without any loss of effectiveness. Tr. II, p. 88 (Boone testimony); PX 64, pp. 47-48 (Bensinger deposition).

b. Members of the press are no more likely to introduce contraband than are lawyers, friends, relatives, or other visitors. PX 64, p. 48 (Bensinger deposition).

c. Members of the press are no more likely to participate in escape plans, to solicit offenses, or to make other unlawful or improper communications with inmates than are lawyers, friends, relatives, or other visitors. PX 64, p. 49 (Bensinger deposition).

C. *Administrative Burdens*

48. The Court finds that press interviews with inmates will create no undue administrative burdens in view of the fact that prison officials have the power to set reasonable restrictions as to time and place, as they do for all visits to penal institutions. Tr. II, p. 88 (Boone testimony); PX 64, p. 51 (Bensinger deposition).

a. The visiting facilities at penal institutions are frequently not used to their full capacity, and thus are availa-

ble for press interviews with inmates. Tr. II, pp. 181-82 (Aldredge testimony). Other facilities—e.g. conference rooms used for attorneys visits—are also likely to be available at many institutions. PX 64, p. 24 (Bensinger deposition).

b. Those jurisdictions which generally permit press interviews with inmates have had a relatively small number of requests for such interviews. Tr. II, p. 230 (Brewer testimony); Tr. I, p. 75 (Malcolm testimony); Tr. I, p. 99 (Anderson testimony); PX 64, p. 52 (Bensinger deposition). In these same jurisdictions, there has been considerable public interest in the prison system. Tr. I, p. 75 (Malcolm testimony); Tr. II, pp. 77-78 (Boone testimony).

c. Most large penal institutions facilitate thousands of interviews per year between inmates and their friends, relatives, and counsel. Tr. II, pp. 178-79 (Aldredge testimony); Tr. I, p. 67 (Malcolm deposition); PX 64, p. 53 (Bensinger testimony). The number of press interviews likely to occur, and the resulting administrative burden, are insignificant in relation to the total number of interviews granted each year. PX 64, p. 53 (Bensinger deposition).

d. Press interviews with inmates do not create significantly greater administrative burdens than other visits from friends, relatives, and counsel. Tr. II, p. 88 (Boone testimony); but *cf.* PX 64, pp. 49-51 (Bensinger deposition).

V. *Benefits of Press Interviews to Correctional System*

49. The Court finds that opportunities for inmates to speak to newsmen tend to reduce tensions within the inmate population of a prison. Tr. I, 73 (Malcolm testimony); Tr. II, p. 83 (Boone testimony).

50. The Court finds that a policy of freely permitting interviews between members of the press and inmates is likely to increase press and public interest in corrections, and may lead to public pressure for improvements in correctional facilities, programs, and administration. Tr. II, pp. 78-79, 80, 84-86 (Boone testimony); PX 65, pp. 45, 26 (Mattick deposition); Tr. I, pp. 72, 73 (Malcolm testimony).

51. The Court finds that there is no better way to combat the destructive influences of the inmate social system, prepare an individual for freedom and increase public awareness than to strengthen inmate ties with the outside world. PX 29(a), p. C67 (Final Report of the Ohio Citizens' Task Force on Corrections); PX 9, pp. xvi-xvii (Attica Report Recommendations). This general principle applies to ties between inmates and the press.

VI. *Policies in American Jurisdictions*

52. Evidence was received showing the current policy with respect to confidential in-depth interviews between members of the press and inmates of correctional institutions in 24 American jurisdictions. The Court finds that of these, 11 generally permit such interviews. See Ex. 1 to PX 64 (Bensinger deposition) (Illinois); PX 22-A (Maine); PX 23-A (Maryland); PX 25-A (Nebraska); PX 28-A (North Carolina); PX 29-A (Ohio); PX 35-A, 35-C (Vermont); DX 7 (Iowa); PX 1, 2, 3 (New York City); PX 5, 6 (District of Columbia); Tr. II, 58-77 (Boone testimony) (Massachusetts). Seven American jurisdictions have policies that neither generally permit nor generally deny such interviews, but vest in correctional administrators discretion to permit or deny them in individual cases. See PX 18-A (Alaska); PX 20-A (Georgia); PX 24-A (Montana); PX 26-A (New Jersey); PX 30-A (Oregon); PX 31-A (Pennsylvania); PX 32-A (South Carolina). Five American jurisdictions generally prohibit such interviews. See PX 19-A (Connecticut); PX 21-A (Kentucky); PX 33 (Virginia); PX 34-A (Wisconsin); Tr. I, p. 114 (California). New Mexico has a unique policy, which does not fit into any of these categories. See PX 27-A, 27-B (New Mexico).

53. The Court finds that there is no substantial reason to believe that the problems involved in administering the federal prisons are more severe than those involved in administering prisons in the 11 jurisdictions that generally permit press interviews. Tr. II, pp. 58, 110-B (Boone testimony); Tr. I, pp. 62, 88 (Malcolm testimony); Tr. I,

pp. 104-07 (Colloquy between the Court and Mr. Hannon); PX 65, pp. 41-42 (Mattick deposition). Contra, Tr. II, pp. 209-10, (Wainwright testimony); PX 64, pp. 65-67 (Hensinger deposition).

a. Federal prisons have a higher percentage of white collar criminals and inmates committed for non-violent crimes than do state or local prisons. PX 65, pp. 41-42 (Mattick deposition).

b. From a correctional point of view, inmates held for trial are far more difficult to manage than are sentenced offenders. Tr. I, p. 88 (Malcolm testimony).

54. The Court finds that defendants have not shown that from a correctional point of view the Federal Bureau of Prisons has any substantial interest in having an absolutely uniform policy with respect to press interviews with inmates applicable at all institutions and to all inmates under its jurisdiction. See Tr. II, pp. 253-61 (Carlson testimony).

a. The policy of the Federal Bureau of Prisons is not to make all its institutions uniform, to have them all uniformly administered, or to treat all inmates as if they had the same correctional needs. Quite the contrary, the policy of the Federal Bureau of Prisons is to establish and maintain various types of institutions, having different correctional policies and serving different correctional needs, so that different inmates are subjected to different institutional experiences in federal correctional institutions. Tr. II, p. 260 (Carlson testimony); DX 11 (Federal Bureau of Prisons Biennial Report, 1970-71).

b. Even among institutions where uniformity may be sought as a matter of policy, in a large number of respects it is not, and cannot be, achieved. Every prison reflects the background, personality, style and training of its chief administrator; the personal qualities of its staff; the region in which it is located; and the daily life of its inmates is affected by its particular physical plant and other resources. As these differ from one institution to another, the inmates at those institutions will inevitably experience significant differences in their rights, privileges and opportunities. In view of these differences, any differences in the administra-

tion of a policy vesting some discretion in prison administrators over the holding of press interviews are of trivial or very minor significance. PX 65, pp. 42-45 (Mattick deposition).

VII. *Feasibility of a Press Interview Policy Vesting Significant Discretion in Prison Officials*

55. The Court finds that state and federal prison officials are able in most cases, and with no more than ordinary human error, to identify actual and potential big wheels and trouble-makers within their institutions.

a. Within the first few weeks of commitment to federal prison, all inmates within the jurisdiction of the Federal Bureau of Prisons receive a thorough evaluation, including intensive diagnostic studies. DX 11, p. 7 (Federal Bureau of Prisons Biennial Report 1970-71). The results of this evaluation are available to prison administrators and are the basis for many significant decisions made with respect to the handling of inmates.

b. In general, and with no more than ordinary human error, prison administrators and their staffs know who are the actual and potential trouble-makers within their institutions at any given time. *See* Tr. II, p. 189 (Alldredge testimony); *cf.* Tr. II, pp. 193, 196-97 (Wainwright testimony).

56. Information similar to that available to federal prison officials is the basis for the operation of Illinois' policy, which generally favors press interviews with individual inmates, but vests significant discretion in prison administrators. This policy has proved to be feasible in Illinois, and has worked satisfactorily. PX 64, pp. 28-31 (Bensinger deposition).

57. The Association of State Correctional Administrators has promulgated a guideline on relations between news media and prisons which provides for discretion in prison administrators to grant or deny interviews on an individual basis. Ex. 2 to PX 64 (Bensinger deposition). In promulgating that guideline, the ASCA took the view

that such a policy would work effectively. PX 64, p. 43 (Bensinger deposition).

58. The National Council on Crime and Delinquency has promulgated a Model Act for the Protection of Rights of Prisoners, § 7 of which provides, *inter alia*, that "[a]ny . . . citizen may make application to visit an institution and talk in private with prisoners if the applicant establishes a legitimate reason for such visit and if the visit is not inconsistent with the public welfare and the safety and security of the institution. The director may reject any such application if the visit or any aspect thereof would be disruptive to the program of the institution." Section 7 further provides:

> "If the application for a visit is denied, the person may apply to [court of general jurisdiction] for an order directing the head of the institution to permit the visit. Such order shall be granted after notice and hearing if it is found that (a) the person is a representative of a public concern regarding the conditions of the prison, (b) he is not a mere curiosity seeker, and (c) it is not established by the head of the institution that the visit, or any aspect of it, would disrupt the program of the institution." PX 15, pp. 18-19 (NCCD Model Act).

This provision plainly contemplates that newsmen shall have opportunities to have private interviews with inmates, subject to discretion in prison administrators to prohibit such interviews where necessary in the interest of protecting the functioning of the institution. The NCCD and the committee which drafted the model act plainly have concluded that the exercise of such discretion by prison administrators is feasible and consistent with correctional goals.

59. The fact that 19 American jurisdictions have policies which permit interviews while giving greater or lesser scope for the exercise of discretion by prison administrators, see paragraph 52, *supra*, shows that a very broad spectrum of opinion of professional correctional admin-

istrators in all parts of the United States believe that a policy granting some degree of discretion to correctional administrators with respect to the permitting or denying of interviews between newsmen and inmates is feasible and consistent with correctional goals.

60. On the basis of the evidence before it, and paragraphs 55 to 59, *supra*, the Court further finds that a policy vesting significant discretion in prison officials with respect to the holding of interviews between inmates and members of the press is feasible and consistent with correctional goals.

CONCLUSIONS OF LAW

1. Plaintiffs are members of the press within the meaning of the First Amendment to the Constitution of the United States.

2. The Free Press Clause of the First Amendment protects the right of the public to be informed by the press about matters of public interest, including the administration of prisons, which are public institutions.

3. The right of the press to gather information is an indispensible element of the public's First Amendment right to be informed about matters of public interest, and accordingly is within the protection of the First Amendment.

4. Plaintiffs' interest in conducting confidential interviews with individual inmates of federal correctional institutions who are willing to be interviewed is an interest in gathering information on a matter of public interest, and accordingly is within the protection of the First Amendment. That interest, protected by the First Amendment, is seriously impaired by the Bureau of Prisons' prohibition of confidential interviews between inmates and members of the press.

5. A continuing flat prohibition against press interviews of any prisoner, at any time, under any circumstances, in any institution is on its face arbitrary.

6. The burden of justifying such a prohibition rests upon the defendants.

7. Under the First Amendment, such a prohibition of

activity within the Amendment's protection is invalid unless the prohibition is no broader than necessary to protect compelling governmental interests. Under this constitutional test, the Court is called upon, not to substitute its own judgment for that of the defendants, but to determine, after balancing the considerations pro and con the challenged prohibition, whether the justification offered is obviously deficient.

8. Defendants have failed to meet their burden of proof. The evidence they have offered in support of justifications for prohibiting interviews between inmates of federal correctional facilities and newsmen is insufficient to establish that the prohibition is no broader than necessary to protect compelling governmental interests.

9. Since there is no compelling governmental interest for prohibiting press interviews with inmates willing to be interviewed, the fact that the challenged policy permits the press to obtain information by other means is constitutionally irrelevant.

10. Defendants' Policy Statement § 1220.1A is overbroad in violation of the First Amendment insofar as it prohibits interviews between members of the press and inmates of federal correctional institutions who are willing to be interviewed by members of the press, except when such interviews are likely to directly and immediately cause serious administrative or disciplinary problems.

Respectfully submitted,
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